COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 00328-97**
Joseph V. McDonough (deceased)	Employee
Martha L. McDonough	Claimant
Boston Edison Company	Employer
Liberty Mutual Insurance Company	Insurer

REVIEWING BOARD DECISION UPON REMAND FROM THE SUPREME JUDICIAL COURT

(Judges Maze-Rothstein, Carroll and Levine)

APPEARANCES

Franklin Lewenberg, Esq., for the employee
Joseph S. Buckley, Jr., Esq., and Richard W. Jensen, Esq., for the insurer

MAZE-ROTHSTEIN, J. This case returns to the reviewing board on remand from the Supreme Judicial Court for a determination of a matter of law, as delineated in footnote 6 of the court's opinion:

> We note that § 31 provides a minimum benefit to the spouse of a deceased employee, apparently regardless of the actual wages earned on the date of eligibility or the formula set forth in § 35C. While neither party has raised the point, we assume that whether this benefit is available to the claimant will be considered on remand.

McDonough's Case, 440 Mass. 603, 608 n.6 (2003). In McDonough, the court held that the claimant could receive no G. L. c. 152, § 31, benefits by way of § 35C, when the employee had taken a lump sum compensated voluntary retirement from the work force, with no intention to return, as of the date of his work-related death more than five years after the date of injury. Id. at 603-604. We now consider whether the $110 minimum weekly benefit available to widows and widowers under § 31 – "in no instance shall said widow or widower, receive less than one hundred and ten dollars per week" – is due the claimant in the present case.

Our inquiry is set against the McDonough court's reasoning supporting its conclusion that no benefits under §§ 31 and 35C were due the claimant, as the employee, at the time of his death, had voluntarily retired from the workforce without contemplating a return and without ongoing earnings-related income. We first note that the court specifically limits its analysis to the application of § 35C. That section requires that the date of death be used to determine the claimant's eligibility for § 31 benefits, and not the date of injury under § 31.

> Following the § 35C instruction that "the applicable benefits shall be those in effect on the first date of eligibility for benefits," the compensation available to the claimant is two-thirds of her husband's wages on the date of his death. See G. L. c. 152, § 31. On that date, he had no wages, however they might be defined. The claimant's husband voluntarily retired from the workforce at age sixty-five in 1991. *He did not reenter the workforce between the time of his retirement and the onset of his illness, and there was no evidence that he had any intention of ever doing so. When he retired, he took his pension as a lump sum and was not in receipt of any stream of earnings-related income at the time of his death.* In these circumstances, § 35C provides no benefits to the claimant.

Id. at 606 (emphasis added).

However, while "§ 35C provides no benefits to the claimant," § 31 – providing the underlying substantive death benefit as "the doorway to compensation," id. at 605 – is not so constricted in scope. We think that the availability of the minimum § 31 death benefit – even in light of the employee's apparently voluntary and permanent absence from the workplace – is borne out by both the statute and the McDonough opinion itself.

The insurer contends that the $110 minimum weekly benefit in § 31applies only if the employee had earnings or some "stream of earnings-related income" at the time of his work-related death. See McDonough at 606. We disagree. Instead, we consider that the statutory language, "in no instance shall said widow or widower, receive less than one hundred and ten dollars per week," defines an unconditional fixed entitlement unrelated to the amount of wages that a deceased employee has earned under § 1(1), either "at the time of his or her injury, or at the time of death." G. L. c. 152, § 31. In so concluding, we must acknowledge that "[t]he text . . . compels neither conclusion, and it may be

surmised that this is because the Legislature did not advert to the precise issue before us. But such specific advertence is not necessary, if the scheme as a whole suggests a particular resolution." Letteney's Case, 429 Mass. 280, 284 (1999).

The problem here, of course, is the lack of earnings (or any equivalent thereof) on the date of death, and the fact that § 35C compels the utilization of that date for the latency cases within its scope. However, this problem has a specific legislative origin, emerging out of a 1950 amendment to § 31, and the 1985 enactment of § 35C. Until 1950, § 31 provided for the widow's or widower's benefits to be calculated only on the employee's earnings on the date of injury, when the employee necessarily had earnings. However, with the addition of the "date of death" as an option for determining earnings, the simple application of the benefits calculation under § 31 became confused and confounding. That 1950 addition, which coincided with the same additions to §§ 32 and 1(3), those sections defining various aspects of "dependency," was a legislative response to the predicament of dependents who became so after the date of injury. For example, in Gleason's Case, 269 Mass. 583 (1930), the court had denied § 31 benefits to the claimant widow at the time of the employee's death, because she had not been a dependent at the time of the work injury that caused the death. Id. at 584-585. Thus, the interpretive quandary emerged. See L. Locke, Workmen's Compensation, 2nd ed., § 371, p. 440 n. 12 (1981)("No case has reached the court since the enactment of this statute testing whether it demonstrates a legislative intent to overrule Beausoleil's Case, [321 Mass. 344 (1947)(holding that death benefits based on statute in effect on date of injury, not date of death)] and to apply in death cases the benefit rate in effect on the date of death").

In any event, "[t]he Legislature need not, and indeed cannot, anticipate every circumstance that may arise under a general principle it enacts. It is for us to deduce what that principle requires." Letteney, supra. One identifiable general principle in § 31 (exceeding concepts of strict wage replacement) is the establishment of a minimum entitlement to a weekly payment of $110, fixed for all widows and widowers whose employee spouses had average weekly wages of $165 or less. (Two thirds of $165 is $110.) Even accepting the insurer's formulation of the necessity of earnings on the date

of death, the § 31 fixed minimum entitlement cannot be regarded as wage replacement per se, because the widow or widower receives the same $110, whether the employee spouse had average weekly wages of, say, $15 or $150.

When examining the question of minimum benefits under the act, there are some important distinctions to be drawn that are tied to the nature and extent of the injury sustained. In certain instances the act adheres to a straight wage replacement methodology; in others it does not. For example, it is noteworthy that the Legislature has seen fit to provide a fixed minimum weekly entitlement for § 34A permanent and total incapacity with weekly payments payable at a rate not "less than the minimum weekly compensation rate."[1] The fixed minimum compensation rates available under §§ 34A and 31 are in stark contrast to that available under § 34 for temporary total incapacity. That section provides that the employee receive only his or her full average weekly wage as the compensation rate when that average weekly wage is less than the aforesaid minimum weekly compensation rate. Unlike the fixed sum minimum rate for § 34A and § 31, the § 34 minimum is truly "wage replacement" in its purest possible form, i.e., 100% of the actual § 1(1) wage. But see Betances v. Consolidated Serv. Corp., 11 Mass. Workers' Comp. Rep. 65, 67, 69 (1997)(eschewing literal interpretation of the statutory language governing the minimum, as it would yield irrational result in that those earning only slightly more than the § 1(11) minimum would be penalized because they would receive the normal 60% rate, yielding a compensation rate less than the 100% for those earning slightly less than the § 1(11) minimum). For discussion, see C. Koziol, Massachusetts Workers' Compensation Reform Act, As Amended, § 8.2, pp. 184-185

[1] General Laws c. 152, § 1(11), established the "minimum weekly compensation rate" as "twenty per cent of the average weekly wage in the commonwealth according to the calculation on or next prior to the date of injury by the deputy director of the division of employment and training." At the time of this writing that rate is $176.89.

(2000).[2] Similarly, there is no minimum compensation rate for § 35 partial incapacity benefits, for which 60% of average weekly wage minus earning capacity always applies. This, too, is a straightforward wage replacement scheme. In sum, the general principle codified in the c. 152 legislative indemnity benefits scheme is clearly one that treats the most severe and catastrophic industrial injuries, those which support the payment of benefits under §§ 34A and/or 31, *more beneficently* than those that are temporary and/or partial in nature. See McDonough, supra at 605, quoting Johnson's Case, 318 Mass. 741, 746 (1945) (act is still "to be construed broadly . . . in the light of its purpose and . . . to promote the accomplishment of its beneficent design").

We consider that the way to harmonize McDonough's emphasis on the wage replacement function of death benefits with its remand on the issue of § 31's "apparent" provision of a minimum entitlement unrelated to wages (id. at n.6) is the concept of, "wage replacement plus." By this we mean that - in addition to the characteristic of the minimum compensation rate discussed above - the feature of § 31, derived from its very language, wholly unique among the indemnity sections (§§ 31, 34, 34A and 35), is that: *Entitlement to § 31 benefits commences as of the date of death, and thereafter is not subject to termination or modification due to changed circumstances until the entire statutory entitlement has been paid.*[3] It is axiomatic that weekly payments under §§ 34, 35, and 34A may be changed if the employee's condition warrants it. See Vass's Case, 319 Mass. 297, 300 (1946). Yet, barring remarriage or death, there is no possible

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[2] See generally Mailhot v. Travelers Ins. Co., 375 Mass. 342 (1978), for trenchant explication of the necessity of statutory interpretation:

> [T]here are likely to be casual overstatements and understatements, half-answers, and gaps in the statutory provisions. As practice develops and the difficulties are revealed, the courts are called on to interweave the statute with decisions answering the difficulties and composing, as far as feasible and reasonable, an harmonious structure faithful to the basic designs and purposes of the legislation.

Id. at 345.

[3] We address here the entitlement that exists prior to the § 31 "extension" that allows benefits to continue so long as the beneficiary is "not fully self-supporting."

termination for the initial § 31 entitlement, once established. At present (and since the 1982 amendment) that entitlement is 250 times the state average weekly wage on the date of injury (or date of death as per § 35C). In prior versions of § 31, the statutory entitlement ranged from $7,600 in 1945 to $32,000 in 1978. In the earliest versions of the statute, the entitlement was 300 weeks. St. 1911, c. 751, II. (6)(300 weeks); St. 1914, c. 708, II. (6)(increasing the benefit to 500 weeks). As such, while wage replacement is inarguably a goal of § 31, the entitlement that flows from it can (and often does) extend well beyond the objective bounds of that initial intent.

As to the fixed sum dependency award, some of the oldest cases addressing the early versions of § 31 are instructive. In Bott's Case, 230 Mass. 152 (1918), the court examined the nature of the death benefit entitlement of a widow, conclusively dependent on her husband under § 32(a), as here. At that time such death benefits did *not* terminate as of remarriage. As to that remarriage, the court stated, "It is manifest from the facts found that in fact she is no longer dependent for her support upon the payments received under the act." Id. at 154. The court described the statutory stance colorfully:

> The ascertainment of dependents is made as of the time of the injury to the deceased employee.[4] It cannot be made as of any other time. St. 1911, c. 711, pt. 2, § 6, as amended. The widow was wholly dependent upon the deceased employee, her husband, at that time, by the conclusive presumption of the act because she was living with him. Section 7 as amended. No provision is made by the act for inquiry into any subsequent change in her condition of dependency. *She may become heiress to a fortune after his death and thus be utterly independent of the payments provided by the act. But there is no provision for an adjudication of that fact.* If such an event should occur, it would be immaterial so far as concerns any procedure under the act. *The act provides that the stated payments shall be made to her during the period covered by the award except in the event of her death.* Whatever incongruity there may be in continuing payments to a person on the presumption that she is dependent on a deceased husband, when in fact she is receiving ample support from a new husband, is a matter for the Legislature and not for the courts to remove.

[4] As noted above, the date of death as an operative date for determination of dependency was added in 1950.

Id. at 155 (emphasis and footnote added). See also Cronin's Case, 234 Mass. 5, 6 (1919). The Legislature removed the incongruity as to remarriage; yet that which might derive from the widow becoming "heiress to a fortune" (or lucky lady of the Lottery) continues to this day. (See footnote 3, infra.)

Likewise, a parent presumed to be dependent on the earnings of his fifteen year old son under § 32(e), received § 31 benefits for the full entitlement of 300 weeks due to his son's work-related death, even though that duration provided for payment well beyond the projected age of eighteen, at which time the legal basis for such payments terminated. Murphy's Case, 218 Mass. 278, 280 (1914). See L. Locke, supra at § 392, p. 471("The parent has a right to all the minor's earnings, and the child has a duty to turn them over to the parent. The parent has a corresponding duty to furnish reasonable support to the child. If the parent can show any dependency on the child's wages, he qualifies as a partial dependent . . . ") and cases cited, id. n.18. See also Carey v. Kernwoood Country Club, 18 Mass. Workers' Comp. Rep. __ (May 25, 2004)(following this early construction for parents dependent on a deceased son's earnings).

It takes but slight imagination to hypothesize a more typical scenario: A 64 year old employee dies at work, and the death is work-related. Well-known to the world at large, and corroborated by ample competent evidence, the employee was to retire in six months. The conclusively presumed dependent spouse is entitled to § 31 benefits up to 250 times the state average weekly wage on the date of injury/death; there is no mechanism in the act to terminate those benefits anytime earlier, even if "it is manifest from the facts found that in fact she [would have been] no longer dependent for her support" on earnings of the employee. Bott's Case, supra.

Therefore, our interpretation that § 31 provides a minimum weekly benefit to all widows and widowers, "regardless of the actual wages earned on the date of eligibility" under § 35C – i.e., the date of death – is entirely consonant with the structure of § 31 from the very beginning of the act. Even though wage replacement may be the primary goal of the act, § 31 also functions, in a lesser way, as a death benefit *qua* death benefit. This function is served by recognizing that, since § 35C can now shift the date of

entitlement to § 31 benefits to a date on which there are no earnings (and no manifest intent to earn in the future, see below), "in no instance" should a widow or widower receive less than $110 per week.

We find further support for our interpretation in the simple fact that not all c. 152 benefits payable to employees or their dependents are, in fact, wage replacement benefits. "In general, the purpose of the Massachusetts Workmen's Compensation Act is to compensate an injured employee for the impairment of his earning capacity.[5] However, § 36 recovery for specified injuries is an exception, providing for payment in addition to all other compensation." Vouniseas's Case, 3 Mass. App. Ct. 133, 134 n.3 (1975). " 'Although one consideration in providing specific compensation undoubtedly is the presumed effect of such permanent handicaps on the employee's ability to compete with others in the labor market, the main purpose is to provide more adequate compensation for the employee's real loss, in a system which has taken away the employee's common law right of action against his employer for personal injuries.' " Id. at 139 n.8, quoting L.Locke, Workmen's Compensation, § 345, p. 412 (1968).[6] It is thus not accurate to state, as does the insurer, that c. 152 provides for only wage replacement and out-of-pocket (i.e., §§ 30, 33, 13A) payments. (Insurer Supplemental Memorandum 2.)

The court's holding in Letteney's Case, 429 Mass. 280 (1999), regarding §§ 31 and 35C, supports this view, as well. In Letteney, the court applied the rationale

[5] We note in passing that "earning capacity," for the loss of which the act provides compensation, Vouniseas, supra, need not be the same as "earnings." Thus, an employee could be retired and not have earnings, but she could still have a capacity to earn, an earning capacity.

[6] "[T]he recovery that an injured employee can expect under the act is still 'slim' when compared to the recovery that one could expect from a successful tort action." CNA Ins. Co. v. Sliski, 433 Mass. 491, 497 (2001), quoting Boardman's Case, 365 Mass. 185, 193 (1974).

embodied in 452 Code Mass. Regs. § 3.02(1) without actually referring to it.[7] The court determined that the employee's status of remaining in the work force, albeit in out-of-state self-employment, enabled his widow to capture his last wage in insured employment in Massachusetts (in 1986) for the purpose of calculating his death benefit under § 35C. Id. at 285. That wage had no actual relevance either to his average weekly wage on the date of injury under § 31 (1955), or his earnings at the time of his work-related retirement and death from mesothelioma in 1991 and 1992, respectively. Id. at 281. Nonetheless, the court deemed such assignment of the death benefit appropriate, because it served the ameliorative purpose of § 35C, "coupled with the conception of workers' compensation as an insurance scheme funded entirely by the contributions of Massachusetts employers." Id. at 284. Thus, actual wage replacement was not at the forefront of the analysis; rather, the court's concern was with the effectuation of the policy in § 35C, that allows for the payment of compensation, "which with the passage of time, the accrual of seniority, and the effect of inflation is likely to be considerably higher." Id. at 283. Similarly, the availability of the $110 minimum weekly benefit is also unrelated to actual earnings as of the date of death under § 35C, but serves the general principles underlying § 31 discussed above.

Finally, the McDonough court's enumeration of factors leading to its denial of benefits under § 35C includes the subjective *intent* of the employee relative to returning to work. That is, the court indicated that if the employee's intention to resume some sort of work – notwithstanding years out of the workforce – were to be placed in evidence,

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[7] 452 Code Mass. Regs. § 3.02(1) provides that,

> For the purposes of M.G.L. c. 152, § 35C, applicable benefits on the first date of eligibility for benefits shall be based on the employee's average weekly wage as of such first date of eligibility for benefits, or, if the employee is not employed on that date, it shall be based on the employee's average weekly wage as of the employee's last date of employment.

Although the McDonough court held that the regulation was inconsistent with § 35C and unenforceable, the court specifically stated that the regulation was not invalid for all purposes. Id. at 607.

that factor could be relevant to the question of § 35C's shifting of the date for benefit calculation. See id at 606. This being the case, the actual receipt of earnings, or some earnings-like "stream" of income, on the date of death (the § 35C date of eligibility for benefits to which that statute mandates the de facto shifting of the date of injury) cannot be regarded as the simple *sine qua non* of death benefit entitlement. The court's reasoning therefore points to the answer to its own question in its footnote six: the minimum benefit under § 31, which "in no instance" is unavailable to widows and widowers, applies even in the absence of earnings on the § 35C date of eligibility.

In so determining the benefit calculation for the present widow, we are mindful of the fact that the McDonough court did not aver that § 35C was not applicable, even though its ameliorative effect was non-existent. The language of the statute is mandatory, and we are constrained to apply it. See Taylor's Case, 44 Mass. App. Ct. 495 (1998). We therefore use the § 35C date of eligibility (date of death) as the date from which the calculation of cost-of-living increases under § 34B will begin. We appreciate that had the claimant merely had the substantive benefit entitlement under § 31, without regard for the impotent, yet required, effect of § 35C on her claim, she would receive the death benefit in accordance with the earnings of the employee as of the date of injury, 1978, using the statute applicable at that time, with § 34B benefits running from that time. However, pursuant to McDonough, that is not available for the § 31 claimant whose benefits are based on a date of eligibility that is more than five years after the date of injury.

Accordingly, we order that § 31 benefits at the rate of $110 per week be paid as of the date of death under § 35C, along with § 34B cost of living adjustments consistent with the provisions therefor in § 35C.

So ordered.

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Susan Maze-Rothstein
Administrative Law Judge

Martine Carroll
Administrative Law Judge

Filed: June 14, 2004

Frederick E. Levine
Administrative Law Judge